Supreme Court, U.S.
FILED

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No:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

RONALD FRANK ZDUN, Petitioner

v

PEOPLE OF THE STATE OF CALIFORNIA,

Respondents

Petition for a Writ of Certiorari
to the Court of Appeal of The State
of California, Second District
Division 6 From a Judgment of the
Superior Court of the State of
California, Santa Barbara County,
Santa Maria Branch,
Hon. James Jennings, Judge

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A DEFENDANT WHO HAS MADE A *FRANKS* SHOWING IS ENTITLED TO A FULL EVIDENTIARY HEARING OR WHETHER THE TRIAL COURT MAY SUBSTITUTE AN IN CAMERA HEARING OVER PETITIONER'S OBJECTION FROM WHICH PETITIONER'S COUNSEL IS EXCLUDED.II. WHETHER THE LEON GOOD FAITH EXCEPTION IS AVAILABLE TO THE AFFIANT OF THE INVALID SEARCH WARRANT .

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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

RONALD FRANK ZDUN,
Defendant and Petitioner
v.
PEOPLE OF THE STATE OF
CALIFORNIA,
Plaintiffs and Respondents

I. Petition for a Writ of Certiorari

To: Honorable William H. Rehnquist, Chief Justice of the United States Supreme Court and to the Honorable Associate Justices of the United States Supreme Court:

Attorney Alison Minet Adams, a Member of the Bar of this Court, on behalf of Ronald Frank Zdun, petitioner, petitions this Court for a writ of certiorari to review the judgment of the California Court of Appeals Second District Division 6.

II. Opinions Below

The Opinion of the Court of Appeal (People v. Ronald Frank Zdun, B086800 "Opinion") is attached at Appendix A (page 23). The denial of review by the California Supreme Court is attached as Appendix B (Page 33). This petition is

based upon the within Argument in support of petition, the Appendix, and the papers and materials on file in the Court of Appeal.

II. Jurisdiction

The judgment of the Court of Appeals was entered on July 16, 1996. The California Supreme Court denied review on October 2, 1996. The jurisdiction of this court is invoked under 28 U.S.C 1257. The Court of Appeal had jurisdiction pursuant to Penal Code section 1237.5 and California Rules of Court rule 31d.

IV. Statutes

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized. (US Constitution Amendment IV)

[N]or shall any State deprive any person of life, liberty, or property, without due process of law. (US Constitution Amendment XIV.)

V. Bail status of petitioner

Petitioner remains free on bail pending final resolution of this appeal.

VI. Statement of Facts

Petitioner Zdun was at home when Santa Barbara sheriff's deputies executed a search warrant. After his arrest he was charged with possessing methamphetamine for sale, a felony. His domestic partner was also arrested and charged as a co-defendant. The defendants were represented by separate counsel--Zdun by Steve Belasco and then by Ilan Funke-Bilu. Ms. Teaford was represented by Santa Barbara County deputy public defender Peter Dullea.

After reviewing the search warrant both counsel brought motions to traverse the warrant Zdun requested that the court grant him an evidentiary hearing under *Franks v. Delaware* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed 2d 667 (1979). Previously Ms. Teaford had moved the court to disclose the identity of the informant and the court held an in camera hearing in which the judge interviewed one of people the defendants believed to be the informant, Tom Greenler. Petitioner and Ms. Teaford were charged with possession of methamphetamine for sale. The case against Teaford was dismissed and Zdun pleaded no contest and was sentenced to the middle term of two years in prison.

In the motion to traverse Petitioner requested an evidentiary hearing specifically relying upon *Franks*. Judge Jennings, however, conducted one or two in camera hearings; other than what was disclosed in the Opinion, Petitioner and present counsel have no knowledge of what was reviewed at those hearings because the record of the hearings, some of the affidavits attached to the motions, and the record of the "evidentiary hearing" (Opinion at p. 5) have been sealed. The opinion indicates in a footnote that the affiant admitted that some of his statements in the search warrant affidavit were imprecise. According to the Court of Appeal at least one officer admitted that there is no contemporaneous record of one of the encounters with an informant --the recording equipment failed--and it is not clear whether the officers were able to monitor the transaction at all. There is no information concerning the reliability of other informants except a bare statement of their good citizenship and the warrant lacks any information concerning the accuracy of their observations. One of the people, Tom Greenler, who claimed to be the informant CRI 1, gave Funke-Bilu an affidavit which contradicted all of the information about him in the search warrant affidavit. Petitioner had no opportunity to cross examine the affiant or the informant and the court refused to interview the informant. (Appellant's opening brief at pp. 7-8.) The court had interviewed an informant at an in camera hearing on Teaford's motion to disclose the informant. (Opinion at p.5).

The court did not hold an evidentiary hearing on the *Franks* motion; although there is some confusion in the unsealed portion of the record, it is undisputed that Zdun's counsel was unable to cross examine any of the persons he believed to be informants nor could he cross examine the affiant concerning the truth of the information contained in the affidavit.

The Court of Appeal determined that Petitioner had made his *Franks* showing (see Opinion of the Court of Appeal, attached at p. 5); but held that the Superior Court properly substituted the in camera proceeding endorsed by the California Supreme Court. (Opinion, supra, citing *People v. Hobbs* (1994) 7 Cal.4th 948.)

Petitioner also argued in all other relevant proceedings (the motions to suppress and to traverse the warrant and on appeal and in the petition for review) that the warrant had issued without probable cause. This was because the affidavit lacked sufficient indicia that the informants were sufficiently reliable (see *Illinois v. Gates* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed2d 527 (1983)) and at least some of the informants' information was stale. Petitioner questioned whether the affiant, against whom petitioner had made a sufficient Franks; showing and who, the Court of Appeal noted, "suggested that several of his statements in his affidavit were imprecise because he was trying to protect the CRI" (Opinion at p. 5 n.5), nevertheless was entitled to rely in good faith on the warrant he had procured through his own "imprecise " (read false) statements. Petitioner argued on appeal that the *Leon* "good faith" exception was not available. (See Appellant's Opening Brief at p 14).

VII ARGUMENT IN SUPPORT OF PETITION

A. The Petition should be granted to resolve the conflict between controlling decisions of this Court and California's application of *Franks v. Delaware* and *United States v. Leon* to challenges to a search warrant and the search instituted in reliance thereupon.

These challenges can be expressed as the questions: A. May an in camera proceeding substitute for the evidentiary hearing contemplated by *Franks v. Delaware* (1984) 438 US 154, 57 L Ed 2d 667)? B. Was the warrant was issued upon probable cause despite many inaccurate and inconsistent statements in the affidavit and the stalenessof the information? C. Is a search warrant affiant who knows that he has presented the magistrate with a warrant that contained false statements nevertheless entitled to rely on *Leon?*

This case presents issues of constitutional importance concerning the use of in camera hearings in place of full evidentiary hearings in motions to suppress evidence seized in violation of the IVth and XIVth Amendments or traverse the search warrant.

Certiorari in this case would not violate the adequate and independent state ground doctrine. (2A Federal Practice, Lawyers' Edition, 3.82,citing inter alia, *Florida v. Meyers* 466 U.S. 380, 80 L.Ed2d 381, 104 S.Ct. 1852.)

By amendment to the State constitution all search and seizure questions raised in California state courts necessarily raise federal questions. (California Constitution Article 1 section 28(d).) Under California law, therefore, there is no longer any independent state ground for the exclusion of evidence in a criminal proceeding and such exclusion must be mandated by the federal Constitution. (*In re Lance W.* 37 Cal.3d 873 (1985).)

Certiorari in this matter is proper on that ground and because the decisions of the state courts are in conflict with controlling authority of this court, specifically with *Franks* and *Leon*. Petitioner initially raised these federal search and seizure questions in his Superior Court pleadings . (People v. Zdun, B086800: Clerks record at 60, Teaford's motion to suppress evidence, Clerks' record at 120, Petitioner's motion to suppress evidence, Clerk's record at 142, Petitioner's motion to suppress evidence (Motion to traverse). His case was heard and a judgment was rendered by "the highest court of the state in which a decision could be had" (Court of Appeal of the State of California Second Appellate District Division 6) and petitioner has exhausted his remedies since he applied for review by the California Supreme Court and his request was denied. (See appendix, see also 2 Federal Practice, Lawyer's Edition, section 3.39,; citing *Mullen v. Western Union Beef Company*, 173 U.S. 116, 42 L, Ed 635, 19 S Ct 404 (1899)).

B: Certiorari is necessary to redress the substantial injustice suffered by Petitioner who concededly had made the required showing under *Franks* yet was denied a full evidentiary hearing.

The in camera proceeding used by the Santa Barbara County Superior Court and ratified by the Court of Appeal, following a California Supreme Court case (*People* v *Hobbs*, supra,) which necessarily interpreted federal law, deprived defendant of procedural and substantive due process. Despite evidence from which a court could conclude that the informant privilege was in fact waived by the informant[1] if not by the police, the court did not even interview the informant at the hearing on this motion.

Court records show that Petitioner did not join in the motion to disclose the informant and therefore the in camera hearing " related to the affidavit"at which he was interviewed by the court (Opinion at p.29) could not properly be considered by the court in deciding any issue raised by appellant.

Certiorari should be granted to prevent substantial injustice to petitioner and to others similarly situated and to aid the administration of justice by deciding whether a defendant who has unquestionably made the necessary substantial preliminary showing under *Franks* is entitled to a full evidentiary hearing at which to cross-examine the affiant and the confidential informant or whether the defendant

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[1] Tom Greenler gave Petitioner an affidavit admitting that he was the confidential informant.

conversely must be satisfied with a secret in camera hearing resulting in a sealed record and sealed minute orders.

The case raises severally related questions: what standard of review is to be applied on appeal; and further whether, as here the prosecution may frustrate a criminal defendant's right to a *Franks* hearing by exercising the informant privilege. Nor is this case necessarily limited to petitioner; informants and search warrants are powerful weapons in the war against drugs and serious offenses. However, these weapons are double edged; if the police are allowed to use them carelessly or indiscriminately all of us suffer.

The extent to which the police conduct can or should be deterred is paramount in Fourth Amendment jurisprudence. Petitioner contends that not only did the sheriff's officers in his case overstep the permissible bounds of the law, they can be deterred from further violations of the right to privacy by proper direction from this court. Under the view adopted by the Court of Appeals, a defendant who had made his preliminary showing under *Franks* nevertheless loses his right to test the truthfulness of the factual statements in the affidavit in the crucible of a full evidentiary hearing.

Petitioner requests certiorari and that the judgment of the Court of Appeal be reversed because the trial court did not permit defendant to cross-examine the affiant and the confidential informants , moreover the trial court did not question the confidential informants nor is there any evidence, qua *Hobbs*, that the magistrate or the district attorney did so. (*People v. Hobbs*, supra, 7 Cal.4th at 976 .)

A necessary part of this question is whether a previous in camera hearing related to codefendant's motion to disclose the informant (Respondent's brief at p. 9[3]) at which the trial court merely had "a conversation with the CRI" (Opinion p.5) constituted a valid *Hobbs* hearing (*People v. Hobbs*, supra at 974). On review Petitioner would contend that the Court of Appeal erred in concluding first that the *Hobbs* hearing satisfied *Franks* and second that the search was nevertheless proper under *United States v. Leon* 468 US 897 [82 L Ed 2d 677(1984). In deciding that defendants were not entitled to a full evidentiary hearing, the Court of Appeal relied in part on a Ninth Circuit case, *United States v. Kyllo* 37 F.3d 526 (1994); (ironically holding that a full *Franks* hearing was required, Id at p.530). Petitioner requests this court to determine whether the court below erroneously required Petitioner to establish the falsity of the affidavit. (Opinion at p.5). Ironically, the California Supreme Court had indicated in *Hobbs* that when all evidence was presented in an in camera hearing the record of which was sealed, thereby depriving petitioner both of his opportunity to rebut the evidence presented to the trial court and to make the showing necessary to secure adequate review, a defendant could not reasonably be expected to make the required showing. (*People v. Luttenberger* 50 Cal. 3d 1(1990)). It amounts to a complete denial of due process to hold him to a burden he cannot meet, and therefore the Court of Appeal's determination that the motion to traverse and to suppress evidence was properly denied in view of petitioner's failure to "establish the affiant engaged in "`actual recklessness or

deliberate falsity'"(Opinion at p.5) appears to demonstrate a distressing disregard for the Fourth Amendment.
Therefore petitioner contends that the judgment of the Court of Appeal must be reversed and the cause remanded for a full hearing to permit petitioner to cross examine the person he believes to be the CRI and the affiant.

Briefly stated, the question presented is whether an in camera hearing pursuant to *Hobbs*, constitutes a proper hearing under *Franks*, where the court has before it uncontroverted evidence that there is no privilege as to the informant whose information as set forth in the affidavit apparently constituted a critical portion of the probable cause to issue the warrant. Related to that issue is the question whether the courts below held petitioner to an improper burden when it required him to establish that the affiant engaged in "'actual recklessness or deliberate falsity'.(*United States v. Kyllo*,supra,37 F.3d 526 at 530)."

Review is necessary to resolve the conflict between the Court of Appeal's interpretation of *Kyllo* and the opinion of the Ninth Circuit in that same case:

> "Clear proof is not required--for it is at the evidentiary hearing itself that the defendant, aided by live testimony and cross-examination, must prove actual recklessness and falsity." (Ibid.)

Further, the Opinion itself suggests that contrary to the conclusions apparently reached by the courts below, the affiant engaged in deliberate falsehoods. The courts below acknowledge that this was a close case whether there was sufficient probable cause to issue the warrant. (Opinion p.5). To decide this issue and whether nevertheless the affiant reasonably relied on the warrant without the benefit of either cross examination of the affiant who elsewhere admitted to deliberate falsehood. Review is also necessary to decide whether the decisions of the courts below on the *Gates* and *Leon* issues were on the incorrect side of a "close case" (Opinion at p.5). Review is also necessary to decide whether the courts' conclusion that the warrant was issued upon probable cause was erroneous in view of the many inaccurate and inconsistent statements in the warrant and the staleness of the information which were acknowledged by the Court of Appeal and whether the affiant was entitled to rely on where the warrant contained facial inconsistencies. The Opinion below relies on *Leon* as a talisman, magically infusing the search with validity. (See Opinion at pp. 6-7.)

Unfortunately for the Opinion below, this Court in *Leon* took pains to emphasize that the officer who knowingly or recklessly submits false information to the magistrate, or who knows that he has misrepresented the facts in the affidavit (as this officer apparently has admitted, see Opinion at note 5), is not entitled to rely upon the objective reasonableness of his fellow officers or on the warrant. (See *United States v. Leon* 468 US 897 [82 L Ed 2d 677] at n24.) Petitioner respectfully questions whether the Court of Appeal's reliance on *Leon* isn't misplaced. The proper inquiry

under *Leon* is not whether the magistrate reasonably issued the warrant (that issue was dealt with in *Gates*) but whether the officer was intended to rely on it. Moreover, it appears that the Court of Appeal may have misconstrued *Leon*. It appears clear that this Court did not intend *Leon* to substitute for a full *Franks* inquiry:

> "It is clear, first that the deference accorded to a magistrate's finding does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based. . .Indeed, 'it would be an unthinkable imposition upon [the magistrate's authority if a warrant affidavit revealed after the fact to contain a deliberately or recklessly false statement, were to stand beyond impeachment."

(*United States v. Leon*, supra, 468 US 897,914,n.12, [82 L Ed 2d 677,693,n.12];citations omitted. It is significant here that the officer who conducted the search and therefore ostensibly relied on the warrant was the same officer who had made the statements about whose truth there was sufficient doubt to warrant a hearing.

It seems to stretch credulity to far to permit an officer to lie to the court and then rely on the warrant to ratify his lies.

Petitioner submits that the Opinion of the Court of Appeal and the decision of the Superior Court are at odds with this Court's prior decisons, *Gates*, and *Leon* and represent a clear and present danger to the continued viability of the protections of the Fourth Amendment and its command that "No warrant shall issue except as issued by a neutral magistrate upon probable cause".

The relief to be requested by Petitioner, should this court grant Certiorari is the evidentiary hearing contemplated by *Franks.* At the Superior Court and in the Court of Appeal, Petitioner contended that the warrant was unreasonably issued under *Illinois* v. *Gates*, supra, 462 U.S. 213 [76 L.Ed.2d 527 .

Petitioner contended in the Superior Court and on appeal that the search warrant was not valid because the information upon which it was based was insufficiently reliable. The informant known as CRI 1 in particular gave inherently unreliable and stale information. The information was uncorroborated and the information regarding the informant's reliability was insufficient to inspire confidence. The informant :"normally purchases small quantities of methamphetamine from a subject known as Ronald Zdun. . .appellant usually purchases quantities of methamphetamine, and. . .usually hides his methamphetamine." It is the vagueness of these terms that renders the informant's reliability suspect. (Appellant's Opening Brief at pp. 11-13). Petitioner specifically disagrees with the Court of Appeal's determination that the information in the search warrant provided by the informants other than CRI I supported a reasonable inference of ongoing drug activities sufficient to overcome its staleness. The affidavit, after all, reveals that Petitioner did not merely state to CRI 1 that he was not selling drugs, it reveals that Petitioner refused to sell drugs every time the police attempted a controlled buy.
In the face of the fact that information relied upon to corroborate CRI 1's information was from October 1993 and the search did not occur until six months later, the Court of

Appeal and the superior court appear to have arbitrarily rejected staleness as one of the factors, one of the circumstances whose totality is to be considered in deciding whether there is probable cause.

Staleness of the information is one of the circumstances to be considered in assessing the totality of the circumstances surrounding a search warrant and its execution. (*United States v. Dozier* 826 F.2d 866, 871 (1987).) Here the record shows that Petitioner specifically disagreed with the Court of Appeal's determination that the information in the search warrant provided by the informants other than CRI I supported a reasonable inference of ongoing drug activities sufficient to overcome its staleness. The affidavit, after all, reveals that Petitioner did not merely state to CRI 1 that he was not selling drugs, it reveals that he refused to sell drugs every time the police attempted a controlled buy.

Moreover, it appears that the reviewing courts in this case have acted like legal technicians, contrary to *Gates* (*Illinois v. Gates* supra,462 U.S. 213, 231 [76 L.Ed.2d 527, 544]), especially the strained reading of the search warrant affidavit on page 5 of the Opinion. It is the practical, commonsense reading of the face of the warrant, coupled with the officer's subsequent admission of misrepresentation of some of the facts that deprives the affidavit of sufficient probable cause to issue the warrant.

Because of the state of the record, most of which is sealed and to which petitioner and his present counsel do not have access, petitioner can do no more than commend that question to this Court as well; noting, however, that were it

not for the denial of the *Franks* hearing, the *Gates* issue as well could be more fully presented to this court.

CONCLUSION

Petioner has been denied fundamental constutional protections which affect his substantive and procedural rights. His property was seized and he was arrested pursuant to an invalid warrant in clear violation of his fourth amendment rights. That is what he has consistently contended in the courts below. But he has been denied his rights to procedural due process by the superior court's substitution of a secret proceeding for the hearing that the decisions of this court prescribe, as a consequence of which his rights to properly portect his Fourth Amendment rights and his right to appeal and to the assistance of counsel have been compromised. This case is part of a disturbing trend to more and more hearings in criminal cases from which the accused is excluded, a serious attack on the right to confront one's accusers or even to know the evidence against one.

For the foregoing reasons Petitioner respectfully requests that this Court grant his petition for certiorari.

Respectfully submitted,

November 29, 1996

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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 6

Filed July16, 1996

THE PEOPLE

Plaintiff and Respondent

vs. 2d Crim. No. B086800

RONALD FRANK ZDUN SM 86322

Defendant and Appellant Santa Barbara County

Ronald Frank Zdun appeals from the judgment entered following his negotiated plea of no contest to possession of more than 28.5 grams of methamphetamine for sale (Health and Saf. Codes, section 11378; Pen. Code, section 1203.073, subd. (b)(2)). He contends he was entitled to a full evidentiary hearing based on his assertions the affiant made statements which were either deliberately false or were made in reckless disregard of the truth. He also maintains there was insufficient evidence to establish probable cause to issue the warrant and that the executing officers did not act with objective reasonable reliance on the validity of the warrant. We affirm.

FACTS

On March 23, 1994, a Santa Barbara police officer prepared an affidavit to support issuance of a search warrant which contained the following information:

During October of 1993, the police instructed a confidential informant, who was considered reliable, to purchase a quarter

pound of methamphetamine from Zdun after the informant told the police of past purchases from Zdun. At a meeting electronically monitored by the police, Zdun and the informant agreed on a price for the methamphetamine. Zdun subsequently refused to contact the informer.

The police had also received information from two citizen informants, who were considered outstanding members of the community, one of them reported activity at Zdun's residence consistent with drug sales. The other reported overhearing Zdun discuss selling methamphetamine. Subsequently, the informant told the police of being assaulted by Zdun and his accomplices because they believed the informant was working with law enforcement. The assault was corroborated by an untested informant.

Within the past ten days, a confidential reliable informant (CRI) who normally purchased small quantities of methamphetamine from Zdun, had seen him "in possession of moderate quantities of methamphetamine packages for sale at his residence". Zdun told the CRI Zdun usually purchases five pounds of methamphetamine at a time and breaks it down for resale. The CRI said Zdun hid the methamphetamine in his residence or in his vehicle.

The CRI had "provided information...on one prior occasion regarding a[n] armed and dangerous subject wanted by law enforcement. The CRI, who was an admitted narcotics user and seller, was assisting the police "in exchange for possible leniency" on a pending felony narcotics violation."

The CRI "had never given any false information and was considered reliable".

Within the past five days the CRI had again contacted Zdun at his residence and "was told by ZDUN that he was aware of [the CRI's] recent narcotics arrest." Zdun said he was getting out of the business because of "recent law enforcement activity." The CRI "felt this statement by ZDUN was a lie because ZDUN had no other means of financial support and the ZDUN made the statement because he felt that since [the CRI] had been arrested that he/she was now working with law enforcement...." The affidavit also contained extensive information regarding the officer's experience with narcotics transactions and his opinion regarding Zdun's activities.On April 1, 1994, police officers searched Zdun's residence pursuant to the warrant and found over three ounces of methamphetamine and several items, including pay/owe sheets and scales, which indicate the methamphetamine was possessed for sale. Zdun said that the pay/owe sheets were used in his business of selling and trading baseball cards and claimed he possessed the methamphetamine for his personal use[2].

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[2] The charge of posssession of methamphetamine filed against Zdun's codefendant who was present during the search was subsequently dismissed.

The trial court denied Zdun's July 5, 1994, suppression motion which argued that there was no probable cause for issuing the warrant and that the officers' reliance on the warrant was not objectively reasonable. On July 19th, 1994, Zdun filed a motion to traverse the warrant "based on the ground that the affidavit on which the warrant was based was not true." The motion was accompanied by declarations of a person claiming to be the CRI, Zdun, Zdun's counsel, and Zdun's counsel's paralegal. Those declarations stated that, on July 8, 1994, Zdun received a telephone call from the CRI saying the CRI had not " done anything against "Zdun[3] The CRI later signed a declaration that the only true information in the affidavit was that he had worked with the police in the past and was again working with them in expectation of leniency in a criminal matter. He was at Zdun's residence within ten days of March 23, 1994, but there was no discussion of drugs. Within five days of the preparation of the

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[3] The following is the transcript of a recording of the telephone conversation that was introduced at the in camera hearing. "Ron, this is ---. I need to talk to you. I'm getting pushed into something I don't want to do and I really need to talk...I mean...we really need to talk. I've never done nothing against you and these people are trying to f--- me up. I won't do. Ain't gonna do it. But I need to talk to you. Thank you very much."

affidavit, Zdun indicated he was aware of the CRI's recent arrest and refused to sell him drugs.[4]

The trial court held in camera hearings on July 27th and July 28th to determine the validity of Zdun's claims. Following the denial of his motion, Zdun entered his plea and was subsequently sentenced to two years in prison.

DISCUSSION

1. " Franks" hearing[5] Zdun acknowledges that the court held an in camera hearing but assumes the court determined he did not make the necessary substantial preliminary showing and denied him an evidentiary hearing. We have reviewed the record of the in camera proceedings. The court indicated Zdun had made the necessary preliminary showing. We agree he met his burden of "casting some reasonable doubt on the veracity of material statements made by the affiant." (*People v. Luttenberger* (1990) 50 Cal.3d 1, 21.) The trial court

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[4] In their brief the People state they requested the declaration which was apparently ordered sealed, but did not receive it with the other sealed materials. The declaration is not part of the record on appeal but it is possible to deduce its contents from statements made at the hearing on the motion to traverse.

[5] *Franks v. Delaware* (1978) 438 U.S. 154 [57 L.Ed.2d 667][where defendant makes substantial showing of false statement in warrant affidavit and the statement is necessary to find probable cause, the defendant is entitled to a hearing to test affiant's statement].

subsequently conducted an evidentiary hearing at which Zdun's counsel was present. The court did not personally question the alleged CRI because the prosecution and the alleged CRI refused to waive the informant privilege, however, the court had before the declaration of the alleged CRI and heard the testimony of those who heard the conflicting statements of the alleged CRI including Zdun, his counsel, a defense investigator who interviewed an alleged CRI and the officer who authored and signed the affidavit[6]. The trial court denied Zdun's request that it personally question the CRI, in fact, the court had talked with the CRI at a previous hearing Based on that conversation and all the evidence presented during the present hearing, the court rejected the assertion that the statements in the affidavit were untrue. It therefore found there to be no material misrepresentations in the affidavit.

The trial court conducted a proper in camera hearing. (*People v. Hobbs* (1994) 7 Cal.4th 948, 974.) We agree with the trial court that Zdun did not establish the affiant engaged in "`actual recklessness or deliberate falsity'" (*United States v. Kyllo* (1994) 37 F.3d. 526, 530.)

2. Probable Cause.

The trial acknowledged that this was a "close case". The court was particularly concerned that statements regarding past police contacts with the CRI were not sufficient to establish credibility. We acknowledge there was

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[6] The affiant suggested that several of his statements in his affidavit were imprecise because he was trying to protect the informant.

minimal specific information establishing the credibility of the CRI and no recent police investigation corroborating the CRI's statements.

Zdun argues that the information obtained in October of 1993 was too stale to be used either to establish probable cause or to bolster the credibility of the CRI. However, the passage of time does not necessarily render the information useless because it could be reasonably inferred that Zdun's involvement in drug sales was an "ongoing scheme." (*People v. Hepner* (1994) 21 Cal.App.4th 761, 783.) The magistrate was given information Zdun had offered to sell methamphetamine to a police informant on October 8, 1993; the informant had been assaulted after his cooperation with the police had been known to Zdun, two responsible citizens had reported activity suggesting drug sales by Zdun; the CRI had given true information to the police on a prior occasion; and the CRI had purchased methamphetamine from Zdun. Zdun's statement that he was no longer selling drugs was not so reliable that it precluded a finding that there was probable cause to believe drugs and/or the indicia of drug sales would still be present at his residence.

Therefore, based on the "totality of the circumstances," (*Illinois v. Gates* (1983) 462 U.S. 213, 230 [76 L.Ed.2d 527, 543]) the magistrate could " make a practical common sense decision ...there was a fair probability that contraband or evidence of a crime (Id. at p.238 [76 L.Ed.2d. 527,548]) would be found at Zdun's residence. There is a substantial basis for the magistrate's conclusion there was probable cause to issue the warrant. (Id., at pp. 238-239.)

3. Objective Good Faith of the Officers. Even if we were to assume there was insufficient probable to issue the warrant, Zdun cannot prevail. The hearing resulted in a finding the issuing magistrate was not "misled by information ...the affiant knew was false or would have known was false except for his disregard of the truth." (*United States v. Leon* (1984) 468 U.S. 897, 923 [82 L.Ed.2d 677,699].) Also, the warrant contained "sufficient indicia of probable cause" (*Bailey v. Superior Court* (1992) 11 Cal.App.4th 1107, 1114) for an officer "exercising reasonable professional judgment" (ibid) to rely on its validity. We conclude the police officers acted with "objective reasonableness" (*United States v. Leon,* supra, 468 U.S. 897, 924 [82 L.Ed.2d 677, 699]) in executing the warrant.

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, J.

We concur:

STONE, P. J.

YEGAN, J.

James B. Jennings, Judge

Superior Court County of Santa Barbara

Ilan Funke-Bilu for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Susan D. Martynec, Supervising Deputy Attorney General, Juliet H. Swoboda, Alan D. Tate, Deputy Attorneys General for Plaintiff and Respondent.

Second Appellate District, Division Six, No. B086800,
S055674

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Respondent

v. Filed October 2, 1996

RONALD FRANK ZDUN, Appellant

Appellant's petition for review DENIED.

GEORGE,
Chief Justice

Declaration re Record:

I, Alison Minet Adams, declare under penalty of perjury that I am petitioner's counsel of record and a member of the bars of this court and the State of California. The record in this case is sealed and I do not have access to it, so I am unable to copy those portions of the text of either the minute orders in the clerk's record or in the reporter's transcript in which the ruling appealed from was made. Appellant counsel cited these points as located between pages 1-193 of Volume 2 of the Reporter's Transcript, 2 Cr. B086800, Clerk's Transcript at 166-170).

November 29, 1996

Alison M. Adams

Proof of Service By Mail

I, Alison Minet Adams, appellant's counsel of record, declare under penalty of perjury that my business address is Post Office Box 3188, Santa Barbara, Ca. 93130 and that on , 1996 I served the within appellant's petition for a writ of certiorari on those persons entitled to such service by placing three copies in a sealed envelope with proper postage affixed in the United States Mails at Santa Barbara, California, addressed as follows: (single "courtesy copies where indicated to non-current counsel, courts.)

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Hon. James Jennings,
Judge of the Superior Court

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Clerk, Court of Appeal (1)
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Second District Division 6
200 E. Santa Clara Street
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Ronald Frank Zdun (1)

Signed under penalty of perjury at Santa Barbara, California, this day of 1996.

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